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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

LONNIE CALIMEE,

Defendant and Appellant.

C085442

(Super. Ct. No. 16FE006026)

A jury found defendant Lonnie Calimee guilty of first degree burglary (Pen. Code, § 459)<sup>1</sup> and sexual penetration of an unconscious person with a foreign object (§ 289, subd. (d)). In a bifurcated proceeding, the trial court found true the allegations that he had one prior serious felony conviction (§ 667, subd. (a)) and seven prior strike convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). The court sentenced him to an aggregate state prison term of 30 years to life.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

On appeal, defendant contends the trial court erred in (1) denying his motions for the appointment of substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), (2) excluding impeachment evidence, (3) instructing the jury with CALCRIM No. 371, and (4) failing to consider his ability to pay before imposing the maximum restitution fine. In a supplemental brief, defendant contends this matter must be remanded to allow the trial court to exercise its newly granted discretion to strike or dismiss his five-year prior serious felony conviction enhancement pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1, 2).

We conclude the trial court did not abuse its discretion in denying defendant's pretrial *Marsden* motion. However, we conclude the trial court erred in denying his postconviction *Marsden* motion. The error requires conditional reversal of the judgment and remand for further proceedings. Because of this disposition, we decline to address defendant's remaining contentions as premature, with one exception. We agree with the parties that the amendments effectuated by Senate Bill No. 1393 (2017-2018 Reg. Sess.) apply retroactively to this case. Therefore, in the event the trial court determines that reinstatement of the judgment is warranted, the court shall exercise its discretion to determine whether to strike or dismiss the five-year prior serious felony conviction enhancement imposed under section 667, subdivision (a). If the trial court decides to strike or dismiss the enhancement, it shall resentence defendant. If the court decides not to do so, it shall reinstate the judgment.

### **FACTUAL BACKGROUND**

The resolution of this appeal requires only a brief recitation of the facts underlying defendant's convictions. Additional background information is discussed *post*.

In March 2016, defendant and the victim, Amy, were homeless. He slept in his car while she slept in a tent.

On March 22, 2016, Amy did not close the entrance to her tent prior to falling asleep around 2:30 a.m. She was wearing jeans over a pair of sweatpants, both of which were pulled down to her thighs. She was not wearing underwear.

Around 3:30 or 4:30 a.m., Amy felt someone touching her. When she woke up, she realized that defendant's finger was inside her vagina. He was touching her in a "rough and very hurtful" manner; he was "slamming" his finger into her vagina. He stopped after she threatened to scream. Shortly thereafter, she went to a hotel and called 911.

Police officers arrived approximately 45 minutes later. After Amy identified defendant from a photograph, she was taken to a clinic where she was examined by Angela Vickers, M.D., an expert in sexual assault and forensic examinations. The examination started at 7:00 a.m. and was completed before 9:00 a.m. Dr. Vickers concluded that Amy's vaginal injuries were likely caused by a "penetrating injury," although she could not determine what type of object caused the injuries. A urine sample collected from Amy tested positive for methamphetamine.

Following the sexual assault examination, the officers took Amy back to the crime scene. Around 9:30 a.m., officers contacted defendant at a nearby gas station. Amy went to that location and identified defendant as the person who had assaulted her.

DNA testing showed that evidence collected from defendant's right hand was consistent with Amy's DNA profile.

## **DISCUSSION**

### **1.0 Appointment of Substitute Counsel**

During the course of the trial court proceedings, defendant made three requests for the appointment of substitute counsel under *Marsden*. The first was made prior to the commencement of trial, the second after the jury returned its guilty verdicts, and the third

at sentencing. On appeal, defendant contends the trial court prejudicially erred in denying his *Marsden* motions because the record reflects that his relationship with appointed counsel had completely broken down for a variety of reasons, including tactical disagreements and counsel's failure to communicate and provide discovery. We conclude the trial court did not abuse its discretion in denying defendant's pretrial *Marsden* motion. However, we conclude the court erred in denying his postconviction *Marsden* motion. As a consequence, we will conditionally reverse the judgment with directions to conduct further proceedings.

### 1.1 *Applicable Law and Standard of Review*

"[C]riminal defendants are entitled under the Constitution to the assistance of court-appointed counsel if they are unable to employ private counsel." (*Marsden, supra*, 2 Cal.3d at p. 123.) This constitutional right encompasses the right to have court-appointed counsel discharged and replaced by another attorney. (*Ibid.*) In California, the seminal case regarding the appointment of substitute counsel is *Marsden*, which gave rise to the term of art, a " '*Marsden* motion.' " (*People v. Smith* (1993) 6 Cal.4th 684, 690 (*Smith* ).)

When a defendant files a *Marsden* motion or otherwise clearly indicates his desire for appointment of substitute counsel, the court must hold a hearing to allow defendant to state the reasons why he believes counsel should be discharged. (*People v. Sanchez* (2011) 53 Cal.4th 80, 89-90 (*Sanchez*); *People v. Mendoza* (2000) 24 Cal.4th 130, 156-157, superseded by statute on another ground as stated in *People v. Brooks* (2017) 3 Cal.5th 1, 62-63 & fn. 8.) "This hearing requirement stems from *Marsden* itself, which gave rise to the term of art '*Marsden* hearing' to describe the proceeding at which such requests are to be resolved." (*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1179.) " " "[A] *Marsden* hearing is . . . an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and

decides whether the allegations have sufficient substance to warrant counsel's replacement." ' ' ' ( *People v. Gutierrez* (2009) 45 Cal.4th 789, 803.)

"Once a defendant is afforded an opportunity to state his . . . reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge. The court does not abuse its discretion in denying a *Marsden* motion ' "unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel." ' [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when 'the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].' " ( *People v. Clark* (2011) 52 Cal.4th 856, 912.)

A defendant's tactical disagreements with counsel are not grounds for granting a *Marsden* motion ( *People v. Dickey* (2005) 35 Cal.4th 884, 922), although it is possible for tactical disagreements to be substantial enough to "signal . . . a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." ( *People v. Barnett* (1998) 17 Cal.4th 1044, 1095.)

The defendant's right to seek the discharge and replacement of court-appointed counsel applies at all stages of a criminal proceeding. The request thus may be made before or after a defendant is convicted. ( *Smith, supra*, 6 Cal.4th at pp. 692, 694.)

When a *Marsden* motion is granted, new counsel is substituted for all purposes in place of the original attorney, who is then relieved of further representation. In the postconviction context, substitute counsel can investigate a possible motion to withdraw the plea or a motion for new trial based upon ineffective assistance of counsel. ( *Smith, supra*, 6 Cal.4th at pp. 695-696; see *People v. Reed* (2010) 183 Cal.App.4th 1137, 1149-1150 ( *Reed*) [when new counsel is appointed after a verdict but before judgment is

entered, new counsel may move for a new trial on the grounds former counsel was ineffective].)

## 1.2 *Additional Background*

Prior to trial, defendant orally moved for the appointment of substitute counsel on the grounds that his counsel had failed to provide him discovery and failed to obtain a statement from his girlfriend, Francesca. Defendant claimed that he had a “trust problem” with counsel, explaining that counsel had failed to inform him about everything that was happening in the case and did not follow through with things he said he would do. When asked for an example, defendant said that counsel had told him he was going to appear in court on a certain date but he never did. He also noted that counsel had failed to bring him books.

When asked about discovery, defense counsel explained that he had only learned about defendant’s desire for discovery “about four weeks ago” and was in the process of redacting over 700 pages of documents so that they could be provided to defendant. Counsel noted that he was reluctant to provide defendant discovery out of fear he would be harmed if other inmates learned about the nature of the charged offenses. Counsel stated that he was particularly concerned about providing discovery related to defendant’s prior sex offenses against a minor. However, after clarifying that the discovery related to defendant’s current offenses was only about 50 pages, counsel agreed to provide the documents to defendant by the end of the day.

With respect to obtaining a statement from Francesca, defense counsel explained that Francesca had already given a statement to former counsel indicating that she was sleeping at the time of the charged offenses and did not know if Amy had used methamphetamine that night. Counsel, however, noted that his investigator was actively trying to locate Francesca to determine whether she had any information that would be helpful to the defense.

When defendant complained that his counsel did not intend on calling an expert to testify about the effects of methamphetamine, counsel explained that he believed calling such a witness would not be helpful to the defense because, even if the expert testified that methamphetamine tends to heighten “sexual proclivities,” Amy’s use of methamphetamine did not give defendant the right to enter her tent and touch her.

The trial court denied defendant’s *Marsden* motion but urged defense counsel to provide defendant with the discovery related to the current charges. The court did not articulate any specific reasons for its ruling.

After the jury returned its guilty verdicts, defense counsel indicated that defendant wanted to “do a *Marsden* motion.” In response, the trial court stated that it would not hold a *Marsden* hearing because defendant could have raised the issue at his last court appearance. The court stated, “What has changed since the last opportunity [defendant] had to renew the *Marsden* motion? [¶] That was the last time you guys were in court. The only thing different now is he’s been convicted, and it’s clear to the Court he’s just angry about the result. [¶] If he wants to file a *Marsden* motion before sentencing, then he can go ahead and file that.” Defendant denied that he was angry and explained that he just wanted to put “certain things” on the record. The court replied, “Well . . . , in that case, you can certainly put things on the record. [¶] You’ve been convicted now. If there are things that warrant a new trial, then your lawyer can pursue those. If not, then you can pursue an appeal, but you don’t need a *Marsden* motion to do that.”

At the sentencing hearing, defendant submitted a written *Marsden* motion. He argued that the appointment of substitute counsel was warranted because his counsel had failed and/or refused to provide adequate representation, and because there was a conflict between them such that he would not receive adequate representation if counsel was not replaced. Without elaboration, defendant claimed that counsel had failed and/or refused to communicate with him, confer with him concerning the preparation of his defense, call

witnesses favorable to his defense, adequately investigate the case, file motions critical to his defense, properly impeach prosecution witnesses, present evidence in support of defense motions, provide discovery as ordered by the court, and declare a conflict between them. Defendant asserted that he would “provide the necessary evidence to support [his] claim[s]” at the hearing on his motion. He further asserted that “due to the lack of adequate representation by counsel [he] has suffered prejudice such as to justify dismissal of charges currently pending, or in the alternative, enjoy the substitution of counsel.”

In denying defendant’s motion, the trial court stated, “I have received a Notice of motion—*Marsden* motion in this matter. I am going to order it filed, and I’m going to order it sealed, and I’m going to deny [the] motion. [¶] The Court did have an opportunity to view [defense counsel] during the course of this trial and, in my opinion, [he] rendered more than adequate representation on a very difficult case. The facts sometimes are just the facts.”

### 1.3 *Analysis*

We conclude the trial court did not err in denying defendant’s pretrial *Marsden* motion. The court permitted defendant to explain the reasons underlying his dissatisfaction with appointed counsel, sought a response from counsel, and considered the information in reaching its decision. The record does not demonstrate that appointed counsel was providing inadequate representation or that he and defendant had become embroiled in an irreconcilable conflict such that ineffective representation was likely to result if he was not replaced. On this record, we cannot conclude that defendant’s tactical disagreements and other complaints about his appointed counsel show that the trial court abused its discretion in denying the motion. The record does not disclose that a failure to replace appointed counsel would have substantially impaired defendant’s right to assistance of counsel.



The People concede, and we agree, that *Marsden* error occurred when the trial court failed to hold a hearing on defendant's postconviction *Marsden* motion. Where, as here, a defendant provides the trial court with " 'some clear indication' " of his desire for substitute counsel, the court must hold a *Marsden* hearing to allow the defendant to explain the basis for the request. (*Sanchez, supra*, 53 Cal.4th at pp. 89-90.) Although the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney is within the discretion of the trial court, the court "cannot thoughtfully exercise its discretion . . . without listening to [the defendant's] reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he [or she] is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. Indeed, '[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of trial tactics and strategy.' [Citation.] Thus, a judge who denies a motion for substitution of attorneys solely on the basis of his [or her] courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.' " (*Marsden, supra*, 2 Cal.3d at pp. 123-124.)

To ensure that the right to discharge and replace appointed counsel is meaningful, the defendant must "be given ample opportunity to explain and if possible to document

the basis of his contention . . . [beyond the] bare complaint[s]” that counsel is not providing adequate assistance. (*Marsden, supra*, 2 Cal.3d at p. 125.) Denial of that opportunity is legal error that compels reversal of the defendant’s conviction unless the record shows beyond a reasonable doubt that the error was harmless. (*Id.* at p. 126; *Reed, supra*, 183 Cal.App.4th at p. 1148.)

We are unpersuaded by the People’s contention that the trial court’s error was harmless beyond a reasonable doubt. Based on the record, we conclude it is possible defendant might have been able to demonstrate at a *Marsden* hearing that appointment of substitute counsel was warranted. His written *Marsden* motion identified a variety of complaints about appointed counsel’s representation, which could have supported a finding of ineffective assistance of counsel. Defendant specifically indicated in his motion that he would provide factual support for his claims at the hearing on the motion. Because the trial court did not hold a *Marsden* hearing, it is unclear whether defendant could have presented evidence or otherwise shown “knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent” from his “bare complaint[s]” that would have tipped the balance in favor of appointment of substitute counsel. (*Marsden, supra*, 2 Cal.3d at pp. 123, 125.) Under these circumstances, we “cannot speculate upon the basis of a silent record that the trial court, after listening to defendant’s reasons, would decide the appointment of new counsel was unnecessary.” (*People v. Winbush* (1988) 205 Cal.App.3d 987, 991.) Accordingly, the trial court’s error in failing to hold a *Marsden* hearing cannot be deemed harmless beyond a reasonable doubt. (*Sanchez, supra*, 53 Cal.4th at p. 92 [prejudicial error to deny a motion for substitution of counsel solely on the basis of courtroom observations, despite a defendant’s offer to relate specific instances of misconduct].) Other courts have reached a similar result where, as here, the defendant was denied the opportunity to explain the specific reasons supporting the appointment of substitute counsel. (See, e.g., *People v.*

*Knight* (2015) 239 Cal.App.4th 1, 4-5, 9; *People v. Hill* (2013) 219 Cal.App.4th 646, 649, 653; *Reed, supra*, 183 Cal.App.4th at pp. 1144-1145.)

Given the potential that defendant could demonstrate at a *Marsden* hearing that the appointment of substitute counsel is warranted, we follow the approach approved by our Supreme Court in *Sanchez* as the “proper disposition.” (*Sanchez, supra*, 53 Cal.4th at p. 93.) Thus, we will conditionally reverse the judgment and remand with directions for further proceedings. (*Id.* at pp. 92-93.)

## **2.0 Senate Bill No. 1393**

Defendant contends that Senate Bill No. 1393 (2017-2018 Reg. Sess.) applies retroactively to this case because it is not yet final, and that this Court must remand the matter to permit the trial court to consider whether to exercise its newly granted discretion to strike or dismiss his prior serious felony conviction enhancement. The People agree.

Pursuant to section 667, subdivision (a), defendant’s sentence included a five-year enhancement for a prior serious felony conviction. At the time defendant was sentenced, the trial court was required to impose a five-year consecutive term for “any person convicted of a serious felony who previously has been convicted of a serious felony” (former § 667, subd. (a)(1)), and had no discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667” (former § 1385, subd. (b)).

Senate Bill No. 1393, effective January 1, 2019, amends section 667, subdivision (a), and section 1385, subdivision (b), to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1, 2.) Citing *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), defendant argues that Senate Bill No. 1393 applies to him because the judgment is not yet final. He contends remand is required because the record does not clearly indicate that the trial

court would not have dismissed the section 667 enhancement if it had the discretion to do so at the time of sentencing. The People agree that *Estrada* requires retroactive application of Senate Bill No. 1393 to this case. The People do not argue that remand would be futile (cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896), noting that “there is no ‘clear indication’ in the record that the trial court would decline to exercise its newly authorized discretion to reduce [defendant’s] sentence.”

We agree with the parties. In *Estrada*, the California Supreme Court stated, “When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.” (*Estrada, supra*, 63 Cal.2d at p. 745.) This includes “acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (*Ibid.*) Thus, under *Estrada*, absent evidence to the contrary, we presume the Legislature intended a statutory amendment reducing punishment to apply retroactively to cases not yet final on appeal. (*Id.* at pp. 747-748; *People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The Supreme Court has applied the *Estrada* rule to amendments giving the trial court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Accordingly, remand is appropriate.

## **DISPOSITION**

The judgment is conditionally reversed and the case remanded for the trial court to hold a *Marsden* hearing on defendant’s postconviction *Marsden* motion. If the court finds defendant has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel

to represent him for all purposes and shall entertain such applications as newly appointed counsel may make, including a motion for new trial. If newly appointed counsel makes no motions, or any motions made are denied, or defendant's *Marsden* motion is denied, the court shall reinstate the judgment.

In the event the trial court determines that reinstatement of the judgment is warranted, the court shall exercise its discretion to determine whether to strike or dismiss the five-year prior serious felony conviction enhancement imposed under section 667, subdivision (a). If the trial court decides to strike or dismiss the enhancement, it shall resentence defendant. If the trial court decides not to do so, it shall reinstate the judgment.

Because of this disposition, we decline to address defendant's remaining contentions as premature.

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BUTZ, Acting P. J.

We concur:

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MAURO, J.

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DUARTE, J.